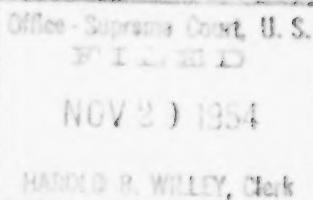


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**BRIEF ON MERITS  
No. 203**



IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1954

FRANK LEWIS, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals  
for the District of Columbia Circuit

**BRIEF FOR THE PETITIONER**

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## INDEX

	Page
Opinion Below .....	1
Jurisdiction .....	1
Questions Presented .....	2
Constitutional Provisions, Statutes and Regulations ..	2
Statement .....	2
Summary of Argument .....	4
Argument .....	6
I. The Wagering Tax Act Is Unconstitutional Because It Compels Self-Incrimination in Contravention of the Fifth Amendment to the Constitution and Imposes Penalties in the Guise of Taxes .....	6
II. The Provisions of the Wagering Tax Act Contravene the Provisions of the Fourth Amendment to the Constitution .....	17
III. United States v. Kahriger Is Neither Controlling Nor Persuasive .....	19
Conclusion .....	24

## CITATIONS

### CASES:

Arnstein v. United States, 54 App. D. C. 199, 296 F. 946, cert. denied, 264 U. S. 595 .....	6
Blau v. United States, 340 U. S. 595 .....	24
Brinegar v. United States, 338 U. S. 595 .....	17
Carroll v. United States, 267 U. S. 132 .....	17
Dumbra v. United States, 268 U. S. 435 .....	17
Estes v. Potter, 183 F. 2d 865, 868, cert. denied, 71 S. Ct. 356, 340 U. S. 920 .....	23
Hazen et al. v. National Rifle Assn. of America, Inc., 101 F. 2d 432, (U. S. Ct. of App. D. of C., 1938) ..	9
Hoffman v. United States, 71 S. Ct. 814, 818 .....	24

	Page
Hutchings v. Burnet, 58 F. 2d 514, 515 .....	9
Irvine v. People, 347 U. S. 128, 130 .....	20
Lewellyn v. Pittsburg B. & L. E. R. Co., 222 F. 177, 185-186 .....	9
License Tax Cases, 5 Wall. 462 .....	20, 21
Lipke v. Lederer, 259 U. S. 557, 562 .....	12, 16
McCray v. United States, 195 U. S. 27, 59 .....	20
Nigro v. United States, 276 U. S. 332 .....	20
Regal Drug Co. v. Wardell, 260 U. S. 386 .....	12
Rogers v. United States, 71 S. Ct. 438 .....	24
Sonzinsky v. United States, 300 U. S. 506 .....	20
Steele v. United States, 267 U. S. 498 .....	17
Storey v. Rives, 68 App. D. C. 325, 97 F. 2d 182, cert denied, 305 U. S. 395 .....	6
United States v. Burr, 25 Fed. Cases, pages 38, 40 No. 14,692e .....	24
United States v. Doremus, 249 U. S. 86, 39 S. Ct. 214, 63 L. Ed. 493 .....	20
United States v. Forys, 113 F. S. 580, 582 (D. C. R. I. 1953) .....	9
United States v. Kahriger, 345 U. S. 22, rehearing denied 345 U. S. 931 .....	5, 9, 12, 13, 15, 16, 19, 20, 21
United States v. La Franca, 282 U. S. 568, 572 .....	12, 16
United States v. Monia, 317 U. S. 424 .....	24
United States v. Murdock, 281 U. S. 141 .....	24
United States v. One Ford Coupe, 272 U. S. 321, 328	16
United States v. Peehart, 103 F. S. 417, 419 (D. C. N. D. Calif. 1952) .....	22
United States v. Raley, 96 F. S. 495, 496 (D. C. D. C. 1951) .....	23
United States v St. Pierre, 132 F. 2d 837, writ dis- missed, 63 S. Ct. 910, 319 U. S. 41 .....	22
United States v. Sanchez, 340 U. S. 42, 71 S. Ct. 108, 95 L. Ed. 47 .....	12, 20
United States v. Statoff, 260 U. S. 477 .....	16
United States v. Sullivan, 272 U. S. 259 .....	11
United States ex rel. Vajtaur v. Commissioner, 47 S. Ct. 302, 273 U. S. 103 .....	24
United States v. Yuginovich, 256 U. S. 450, 464 ..	16, 18
Veazie Bank v. Fenno, 8 Wall. 533 .....	20

	Page
<b>CONSTITUTIONAL PROVISIONS,</b>	
<b>STATUTES AND REGULATIONS:</b>	
Act of October 20, 1951, e. 521, Title IV, § 471(a), 65	
Stat. 529. Title 26 U. S. C. Secs. 3285 et seq.,	
Chapter 27A, Internal Revenue Code (Wagering	
Tax Act) ..... 2, 15, 17, 18, 19, 20, 22	
Title 26, U. S. C., Section 3285 ..... 2, 4, 6, 7, 8, 9, 10	
Title 26, U. S. C., Section 3290 ..... 4, 7, 8, 12, 13, 19, 23, 25	
Title 26, U. S. C., Section 3291 ..... 19	
Title 26, U. S. C., Section 3293 ..... 17, 18, 22, 25	
Title 26, U. S. C., Section 3294 ..... 3	
Title 26, U. S. C., Section 3297 ..... 11, 21	
Title 26, U. S. C., Section 3271 ..... 10	
Title 26, U. S. C., Section 3275 ..... 5, 17, 18, 22, 25	
Act of June 25, 1948, e. 645, 62 Stat. 701, Title 18,	
U. S. C., Sec. 371 ..... 6, 14	
Act of March 3, 1901, 31 Stat. 1330, ch. 854, § 863;	
June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5,	
1938, 52 Stat. 198, ch. 72, § 1, Title 22, D. C. Code,	
Sec. 1501 ..... 6	
Act of April 5, 1938, 52 Stat. 198, ch. 72, § 2, Title	
22, D. C. Code, Sec. 1502 ..... 6	
Act of March 3, 1901, 31 Stat. 1330, ch. 854, § 864,	
Title 22, D. C. Code, Sec. 1503 ..... 6	
Act of March 3, 1901, 31 Stat. 1331, ch. 854, § 869;	
May 16, 1908, 35 Stat. 164, ch. 172, § 3, Title 22,	
D. C. Code, Sec. 1508 ..... 6	
Act of October 28, 1919, e. 85, Sec. 1 et seq. 41 Stat.	
305 "National Prohibition Act" ..... 16, 21	
Fourth Amendment of the Constitution of the United	
States ..... 5, 17, 18	
Fifth Amendment of the Constitution of the United	
States ..... 11, 15	
Treasury Regulations 132, Section 325.21 ..... 10	
Treasury Regulations 132, Section 325.24 ..... 10	
Treasury Regulations 132, Section 325.25 ..... 10	
Treasury Regulations 132, Section 325.30 ..... 11	
Treasury Regulations 132, Section 325.40 ..... 15	
Treasury Regulations 132, Section 325.41 ..... 13	
Treasury Regulations 132, Section 325.42 ..... 10	
Treasury Regulations 132, Section 325.50 ..... 15	
Treasury Regulations 132, Section 325.51 ..... 15	

## Index Continued

	Page
Treasury Regulations 132, Section 325.52 .....	15
Treasury Regulations 132, Section 325.53 .....	15, 18
Treasury Regulations 132, Section 325.54 .....	15
Treasury Decision 4929, Sec. 463C.32 .....	18, 22
Treasury Decision 4929, Sec. 463C.33 .....	18, 22
Treasury Decision 4929, Sec. 463C.34 .....	18, 22
Treasury Decision 5138, Sec. 458.611 .....	18, 22
Article I, Section 8, Clause 17, United States Constitution .....	21
Form 730 .....	11, 23

**MISCELLANEOUS:**

Brief for the United States in case of United States v. Kahriger, <i>supra</i> .....	19
Reply Brief for the United States in case of United States v. Kahriger, <i>supra</i> .....	19
House Report 581, 82d Congress, 1st Sess., p. 60 ..	15
Senate Report 781, 82d Congress, 1st Sess., p. 118 ..	15
Black's Law Dictionary, 3d Ed. 1944, p. 260, 605 ..	9
Brief for U. S. in Opposition to the Petition for a Writ of Cert. .....	6, 11

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**BRIEF FOR THE PETITIONER**

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**OPINION BELOW**

The Opinion of the United States Court of Appeals for  
the District of Columbia Circuit (R. 34) is reported at  
214 F. 2d 853.

**JURISDICTION**

The Judgment of the United States Court of Appeals  
for the District of Columbia Circuit was entered on  
June 10, 1954 (R. 35). The Petition was filed July 9,  
1954 and was granted October 14, 1954. The jurisdiction  
of this Court rests on 28 U. S. C. 1254(1).

**QUESTIONS PRESENTED**

(1) Does Chapter 27A of the Internal Revenue Code 26 U. S. C., Section 3285 et seq. (Wagering Tax Act) as applied in the District of Columbia to this petitioner contravene the Fifth Amendment to the United States Constitution?

(2) Is Chapter 27A of the Internal Revenue Code, 26 U. S. C., Section 3285 et seq. (Wagering Tax Act) as applied in the District of Columbia to this petitioner a legitimate exercise of the taxing power inasmuch as its provisions impose penalties in the guise of taxes?

(3) Do the provisions of Chapter 27A of the Internal Revenue Code, 26 U. S. C., Section 3285 et seq. (Wagering Tax Act) as applied in the District of Columbia to this petitioner contravene the provisions of the Fourth Amendment to the United States Constitution?

**CONSTITUTIONAL PROVISIONS, STATUTES  
AND REGULATIONS**

The pertinent text of the foregoing are set out in the Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

**STATEMENT**

By information filed by the United States in the Municipal Court for the District of Columbia on October 7, 1952, (R. 1), the defendant in this case was charged as follows:

"Frank Lewis on December 13, 1951, and on diverse other days thereafter during the month of December, 1951, in the District of Columbia *engaged in the business of accepting wagers, by reason of such activity he was required by law to pay the occupational tax (wagering) of Fifty Dollars (\$50.00) as imposed by Section 3290 of Internal Revenue Code*, he failed to

pay said tax, all in violation of Section 3294(a) Internal Revenue Code; Title 26, U. S. Code, Section 3294(a) and Section 2707(b) Internal Revenue Code as made applicable by Section 3294(c) Internal Revenue Code." (Italics supplied)

On October 28, 1952, a Motion to Dismiss this Information was filed. (R. 4)

The Municipal Court for the District of Columbia entered an Order on July 24, 1953, sustaining the petitioner's Motion to Dismiss (R. 26) and filed at that time a written Opinion (R. 4-26). The United States filed a Notice of Appeal on August 3, 1953 (R. 27). An Agreed Statement of Proceedings was filed on August 24, 1953 (R. 28). The Municipal Court of Appeals for the District of Columbia Circuit entered an Order on November 6, 1953, reversing the Municipal Court for the District of Columbia and remanding the case (R. 33). At the same time, the Municipal Court of Appeals for the District of Columbia filed a written Opinion (R. 29-33). On November 16, 1953, the petitioner by his counsel filed a Petition for an Allowance of Appeal to the United States Court of Appeals for the District of Columbia Circuit. The transcript of the Record from the Municipal Court of Appeals for the District of Columbia was filed with the United States Court of Appeals for the District of Columbia Circuit on November 20, 1953. The Petition for an Allowance of Appeal was heard on December 23, 1953, and this appeal was allowed on December 24, 1953. The United States Court of Appeals for the District of Columbia Circuit on June 10, 1954, affirmed the judgment of the Municipal Court of Appeals for the District of Columbia (R. 35). A Motion to Stay the Issuance of the Mandate for thirty days, to wit, until July 10, 1954, to enable this petitioner to make application to this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit was filed with that Court on June 16 and on June 23, 1954, and that Court

ordered the Mandate to be stayed to and including July 10, 1954. The Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit was filed in this Court on July 9, 1954, and the Writ was granted on October 14, 1954.

### SUMMARY OF ARGUMENT

The 10% tax imposed on wagers by Section 3285, Title 26, U.S.C. (Pet. for Cert., pages 27-28) is *retrospective* and is levied only on wagers which have been accepted. This has been admitted by the United States. See fn. 1, p. 6 infra. *All of the wagering activities subject to the 10% tax are wholly prohibited by Federal law in the District of Columbia.* See fn. 2, p. 6 infra. Payment of the 10% tax would thus compel this petitioner to incriminate himself in contravention of the Fifth Amendment to the United States Constitution. Therefore, this petitioner was not liable and could not become liable for this 10% tax and the 10% tax is not a true tax but is a penalty in the guise of a tax.

Liability for the 10% tax imposed by Section 3285 is the *sine qua non* for the \$50 tax imposed by Section 3290, Title 26, U.S.C. (Pet. for Cert., p. 29). Therefore, this petitioner could not be required to pay the \$50 tax imposed by Section 3290 for which failure to pay he has been charged criminally.

*This analysis applies even if the \$50 tax section, Section 3290, is construed to require the payment of the \$50 tax prior to the acceptance of a wager.* Under such a construction only those who would subsequently be liable for the 10% tax would be required to pay the \$50 and register prior to accepting wagers. Since in the District of Columbia this petitioner is not and could not become liable for the 10% tax as it is unconstitutional as applied to him, he cannot be obliged to pay the \$50 tax.

Section 3290 imposing the \$50 tax is of itself unconstitutional in that it contravenes the Fifth Amendment and imposes a penalty in the guise of a tax. Since there can be no

liability for the 10% tax until the acceptance of a wager by one *engaged in the business of accepting wagers*, the \$50 tax is not owing and due until *after* the acceptance of some wagers, or at the least, one wager. Therefore, payment of the \$50 and registration contemporaneous therewith would compel the petitioner to incriminate himself in the District of Columbia in violation of the Fifth Amendment. And, since the United States is required to prove that the petitioner was engaged in the business of accepting wagers and had in fact violated Federal law in the District of Columbia by accepting wagers in order to prove liability for the \$50 tax, the \$50 tax itself imposes a penalty in the guise of a tax.

The provisions of the Wagering Tax Act also contravene the provisions of the Fourth Amendment to the Constitution in that the requirements for posting provided for in Section 3275, Title 26, U. S. C. and Section 3293, Title 26, U. S. C. would put the United States Attorney and the Metropolitan Police in the District of Columbia on notice that the compliant was engaged in activities in violation of Federal law in the District of Columbia and would lay a predicate for the issuance of a search warrant. These provisions constitute a device to obtain information under the guise of the taxing authority so that thereafter the United States could assert probable cause for the issuance of a search warrant and subsequently contend that any search or seizure pursuant thereto was valid.

The case of *United States v. Kahriger*, 345 U. S. 22, rehearing denied 345 U. S. 931, which arose in the State of Pennsylvania is neither controlling nor persuasive in this case because wagering activities subject to the provisions of the Wagering Tax Act are not illegal under Federal law in the State of Pennsylvania. All such activities are illegal under Federal law in the District of Columbia.

## ARGUMENT

### I.

#### **THE WAGERING TAX ACT IS UNCONSTITUTIONAL BECAUSE IT COMPELS SELF-INCRIMINATION IN CONTRAVENTION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND IMPOSES PENALTIES IN THE GUISE OF TAXES.**

Analysis of the 10% tax on wagers imposed by Section 3285, Title 26, U.S.C. is essential to answer the questions posed by this case. This flows from the fact that in order to be subject to the \$50 tax imposed by Section 3290, Title 26, U.S.C. an individual must be obligated to pay the 10% tax. *This (the 10%) tax is retrospective*, that is, it is levied on wagers which have been actually accepted. This has been admitted by the United States.<sup>1</sup> The amount of the tax which must be paid monthly is determined by the amount of wagers which have been accepted in the particular month. Obviously, if acceptance of a wager is a Federal crime, then payment of the 10% tax requires the taxpayer to admit this. All of the wagering activities subject to this 10% tax are wholly prohibited by Federal law in the District of Columbia.<sup>2</sup> Therefore, this petitioner cannot be liable for the

<sup>1</sup> Brief for the United States in Opposition to the Petition for a Writ of Certiorari, page 8 ". . . the 10% is retrospective and is levied on the gains of past activities . . ."

<sup>2</sup> Arnstein v. United States, 54 App. D. C. 199, 296 F. 946, cert. denied 264 U. S. 595; Storey v. Rives, 68 App. D. C. 325, 97 F. 2d 182, cert. denied, 305 U. S. 395; Act of June 25, 1948, c. 645, 62 Stat. 701, Title 18, U. S. C., See. 371 (Federal Conspiracy Statute) (Pet. for Cert., p. 34); Act of March 3, 1901, 31 Stat. 1330, ch. 854, § 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, § 1, Title 22, D. C. Code, See. 1501. (prohibits lotteries) (Pet. for Cert., p. 32), Act of April 5, 1938, 52 Stat. 198, ch. 72, § 2, Title 22, D. C. Code, See. 1502 (prohibits lotteries) (Pet. for Cert., p. 32); Act of March 3, 1901, 31 Stat. 1330, ch. 854, § 864, Title 22, D. C. Code, See. 1503 (prohibits lotteries) (Pet. for Cert., p. 33), Act of March 3, 1901, 31 Stat. 1331, ch. 854, § 869; May 16, 1908, 35 Stat. 164, ch. 172, § 3, Title 22, D. C. Code, See. 1508 (prohibits betting, gambling and making book on races or contests of any kind) (Pet. for Cert., p. 33).

10% tax on wagers because, to exact such a tax violates the Fifth Amendment to the United States Constitution and, also, the tax imposes a penalty in the guise of a tax. It follows then, that this petitioner was not obligated to pay the \$50 tax which rests upon the 10% tax.

To come to this conclusion it is essential that Sections 3285, and 3290, be carefully reviewed. Section 3285, which is the revenue raising portion of this Act, reads in part as follows:

“CHAPTER 27A—WAGERING TAXES.

“Subchapter A—Tax on Wagers.

“(a) Wagers. There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.” (Pet. for Cert.—page 27)

“(b) Definitions. For the purposes of this chapter—

“(1) The term ‘wager’ means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.”

Contrary to popular belief, all persons engaged in wagering activities are not liable for this 10% tax. Section 3285(b)(2) exempts certain types of wagering activities from this tax. That section reads as follows:

“(2) The term ‘lottery’ includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived

from such drawing inures to the benefit of any private shareholder or individual."

Thus, the 10% tax does not apply to wagers made in bingo games, poker games, roulette games, dice games, blackjack and the like.

In addition, Section 3285(e) exempts certain other types of wagers from the 10% tax. That section reads as follows:

"(e) Exclusions from tax. No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by Section 3267."

It is clear from the foregoing that certain wagering activities are exempted from the 10% tax by statutory exemption and that persons engaged in those exempted types of wagering activities are not liable for the 10% tax. Such persons are exempted from the payment of the \$50 tax imposed by Section 3290, as the \$50 tax need be paid only by those liable for the 10% tax. This is clear from a reading of Section 3290, which reads as follows:

"A special tax of \$50 per year shall be paid by each person *who is liable for tax under subchapter A* or who is engaged in receiving wagers for or on behalf of any person so liable." (Italics supplied)

Section 3285(d) defines the persons who are liable for the 10% tax and reads as follows:

"(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who

conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery."

To ascertain who is liable for the 10% tax requires first a determination of what is meant by the words "engaged in the business." This is a phrase of art commonly defined as requiring acts of business to be conducted, prosecuted and continued. A single or occasional disconnected act does not constitute engaging in business.<sup>3</sup> In fact, subsequent to the opinion of this Court in *United States v. Kahriger*, 345 U. S. 22, rehearing denied 345 U. S. 931, District Judge Gibson in the case of *United States v. Forys*, 113 F. Supp. 580, 582 (D. C. R. I. 1953), in construing this very Act, stated:

"... the acceptance of a single wager does not make the acceptor subject to this tax or subject to a penalty for not paying the tax. . . ."

The Court went on to state that with respect to the allegation that the defendant had "engaged in the business of accepting wagers":

"... it requires the Government to prove that the defendant was a person 'engaged in the business of accepting \* \* \* wagers' under the provisions of Sec. 3285."

Therefore, several wagers must be accepted before a person can be said to be "*engaged in the business*" of accepting wagers. (T. R. Reg. 132, Section 325.21 (Peti-

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<sup>3</sup> *Hazen et al. v. National Rifle Assn. of America, Inc.*, 101 F. 2d 432, 439 (U. S. Ct. of App., D. C. 1938).

*Hutchings v. Burnet*, 58 F. 2d 514, 515 (U. S. Ct. of App., D. C. 1932).

Black's Law Dictionary, 3d Edition, 1944, pp. 260, 605.

*Lewellyn v. Pittsburg, B. & L. E. R. Co.*, 222 Fed. Rep. 177, 185-186, cited with approval in G. C. M. 17014 (C. B. XV-2, 317 (1936)).

tion for Cert., p. 35)). However, no matter how narrowly Section 3285(d) is construed, at least one wager must be accepted before a person can be liable for the 10% tax. (Tr. Reg. 132, Sec. 325.24 (Pet. for Cert., p. 35)).

The Bureau of Internal Revenue by Treasury Reg. 132, Section 325.25 (Pet. for Cert., p. 36) states when the 10% tax attaches. That section reads as follows:

“Sec. 325.25. When tax attaches.

“(a) The tax attaches when (1) a person engaged in the business of accepting wagers with respect to a sports event or a contest, or (2) a person who operates a wagering pool or lottery for profit, *accepts a wager or contribution from a bettor*. In the case of a wager or credit, the tax attaches whether or not the amount of the wager is actually collected from the bettor.”  
(Italics supplied)

The Bureau of Internal Revenue has also by Treasury Reg. 132, Section 325.42, Subsection (b), (Pet. for Cert., p. 39) defined the words “commencing business” appearing in Section 3271, Title 26, U. S. C. (Pet. for Cert., p. 43) as “*the initial acceptance of a wager by a person liable for the 10% excise tax . . .*” (Italics supplied).

Sec. 3285(d) provides further that each person shall pay the tax on all wagers *placed with him or placed in a pool or lottery*. Obviously, the tax cannot be compelled to be paid on wagers which have not been placed. The 10% tax has to have at least one wager on which to attach. It cannot fall on a vacuum.

It has been shown that the acceptance of even one wager in the District of Columbia is wholly prohibited by Federal law. From this fact it must be concluded that the 10% tax imposed by Subchapter A is unconstitutional as applied to this petitioner in the District of Columbia and there are two uncontrovertible arguments in support of this assertion.

First, the 10% tax must be paid by the taxpayer on the last day of each month succeeding the month in which the wagers were accepted,<sup>4</sup> at which time the taxpayer must file a form denominated "Tax on Wagering" (Pet. for Cert., pp. 45-46). A reading of this return discloses that all of the questions are incriminatory on their face and are offensive. Therefore, the rule enunciated by this Court in *United States v. Sullivan*, 274 U. S. 259 does not apply. This requirement which compels a person to file this return on the last day of each month succeeding the month in which the wagers were accepted constitutes compulsory filing of monthly reports admitting Federal crimes which had been committed by the taxpayer, to wit, the acceptance of wagers in the District of Columbia in violation of Federal law proscribing such activities. Therefore, Section 3285 which the United States admits deals with and can only deal with past acts,<sup>5</sup> namely, the payment of a tax on wagers which have been accepted and the filing of a return admitting that fact, contravenes the Fifth Amendment and is unconstitutional.

Secondly, having shown that at least one wager must be accepted before there is any liability for the 10% tax, it is obvious that to successfully collect and retain the taxes alleged to be due, the United States would have to claim and ultimately prove that this petitioner had accepted wagers or at least one wager, a Federal offense. There are no provisions of District of Columbia law whereby a person is licensed to engage in wagering activities. *All such activities are prohibited by Federal law.* This Court has repeatedly held that where evidence of the commission of a Federal offense is essential to the imposition of a tax it lacks the ordinary characteristics of a tax and is a penalty and

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<sup>4</sup> T. R. 132, Sec. 325.30. (Pet. for Cert., p. 36)

<sup>5</sup> Brief for United States in Opposition to Petition for Certiorari, page 8.

not a legitimate exercise of the taxing power.<sup>6</sup> In the most recent case decided on this point, this Court in *United States v. Sanchez*, 340 U. S. 42, 71 S. Ct. 108, 110, in upholding the validity of the Marihuana Tax Act found that tax to be valid because it stated:

“Second. *The tax levied by Sec. 2590(a)(2) is not conditioned upon the commission of a crime. The tax is on the transfer of marihuana to a person who has not paid the special tax and registered. Such a transfer is not made an unlawful act under the statute.* Liability for the payment of the tax rests primarily with the transferee; but if he fails to pay, then the transferor, as here, becomes liable. It is thus the failure of the transferee to pay the tax that gives rise to the liability of the transferor. *Since his tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil rather than a criminal sanction . . .*” (Italics supplied)

This rationale cannot be applicable to the case at hand.

It is submitted that the foregoing arguments clearly show the unconstitutionality of the 10% tax as applied to this petitioner in the District of Columbia.

This petitioner, as was Kahriger, has been charged with failing to comply with Section 3290, the \$50 tax section. However, the situation in this case differs radically from that confronting the Court when it arrived at this point in *Kahriger*. When this Court turned to a consideration of the \$50 tax section in *Kahriger*, supra, it had theretofore concluded that the 10% tax which is the substance of the Wagering Tax Act was constitutional as applied in the states. Having so found, this Court found nothing offensive in the \$50 tax or the registration statement which must accompany its payment stating that all the latter was designed to do was to aid in the collection of the 10% tax.

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<sup>6</sup> *Lipke v. Lederer*, 259 U. S. 557, 561-562, *Regal Drug Corp. v. Wardell*, 260 U. S. 386, *United States v. La Franca*, 282 U. S. 572, *U. S. v. One Ford Coupe*, 272 U. S. 321, 328.

(*Kahriger*, pages 31-32). But it has been shown that as to this petitioner the 10% tax is unconstitutional. Liability for the payment of the \$50 tax required by Section 3290 is predicated on a liability for the 10% tax and this petitioner was therefore under no obligation to pay the \$50 tax and register contemporaneously with such payment. That this is true is apparent from a rereading of the \$50 tax section which reads as follows:

“A special tax of \$50 per year shall be paid by each person *who is liable for tax under subchapter A* or who is engaged in receiving wagers for or on behalf of any person so liable.”

Obviously liability for the 10% tax is the *sine qua non* for liability for the \$50 tax. T. R. 132, Sec. 325.41 (Pet. for Cert., p. 38). Where there is no liability for the 10% tax, either by virtue of the exemptions in the 10% tax section or because the 10% tax is unconstitutional as applied in a Federal jurisdiction, there is no liability for the \$50 tax. Therefore, even if this Court were to adopt the distorted construction of the \$50 tax section placed on that section by the Municipal Court of Appeals for the District of Columbia (R. 29-33), to wit, that the \$50 tax must be paid before the acceptance of a wager, there still would be no violation of that section by this petitioner. This petitioner would not subsequently be liable for the 10% tax because it is unconstitutional as applied to him. Therefore, even if the \$50 tax section were to be rewritten to provide that a special tax of \$50 shall be paid by each person who is going to be liable for the 10% tax, this petitioner still would not be under any constitutional obligation to comply with that provision because he is not, will not, and cannot become liable for the 10% tax.

There is still an additional reason why this petitioner was not required to pay the \$50 tax even if Section 3290 were to be interpreted to mean that the tax must be paid

prior to engaging in the business of accepting wagers. As the Municipal Court for the District of Columbia pointed out (R. 11):

"Even if, for the sake of argument, it were to be admitted that this contention in general is sound, I feel it would fall in the District of Columbia by the virtue of the criminal sanctions that can be imposed under Section 371 of Title 18, U. S. C. For even assuming that the payment of the tax and registering would not compel a confession of past illegal substantive acts, nevertheless if two or more persons conspired to violate any of the anti-gambling provisions of the District of Columbia and in pursuance of that conspiracy one of the conspirators applied for a tax stamp, such an act would be an overt act in furtherance of the conspiracy and sufficient to sustain a conviction. . . ."

Since, therefore, a distorted construction of the \$50 tax section does not render that section applicable to this petitioner, this Court should not distort its plain and obvious meaning as did the lower appellate courts. The lower appellate courts would have this Court read the \$50 tax section as follows:

"A special tax of \$50 per year shall be paid by each person \* \* \*"

But the statute contains the words sought to be stricken. Words could not be found which are clearer than those used in this section, namely *that the tax of \$50 shall be paid only by those who are liable for the 10% tax* which means those engaged in the business of accepting wagers and who have accepted at least one wager. The Congress itself in its committee report affirms this statement for it said:

"The committee conceives of the occupational tax as an integral part of any plan for the taxation of wagers and as essential to the collection and enforcement of such a tax. Enforcement of a tax on wagers frequently will necessitate the tracing of transactions

through complex business relationships, thus requiring the identification of the various steps involved. For this reason, the bill *provides that a person who pays the occupational tax must, as part of his registration, identify those persons who are engaged in receiving wagers for or on his behalf, and, in addition, identify the persons on whose behalf he is engaged in receiving wagers.*" (H. Rep. 586, 82d Cong., 1st Sess., p. 60; S. Rep. 781, 82d Cong., 1st Sess., p. 118) (Italics supplied)

Since the \$50 tax is not owing and due until a person engaged in the business of accepting wagers has accepted at least one wager, the requirement to pay the \$50 and register contemporaneously therewith also compels self-incrimination in contravention of the Fifth Amendment because by paying the \$50 tax and registering he would admit that he was engaged in the business of accepting wagers and had accepted at least one wager. Further, the \$50 required to be paid constitutes the imposition of a penalty and is not a true tax. To collect the tax it is necessary to first prove the commission of a Federal criminal offense. (T. R. 132, Sees. 325.50, 325.51, 325.52, 325.53, 325.54, Pet. for Cert., pp. 39-41). Therefore, the \$50 tax section is itself unconstitutional.

It is submitted that the lower appellate courts misinterpreted the language of this Court in the *Kahriger* case at pages 32-33 wherein it stated that Kahriger was not compelled by the registration provisions of the Wagering Tax Act to confess to acts already committed but was merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions. All that this Court could have meant by that statement was that compliance with the registration provisions would not compel Kahriger to admit any violation of any existing Federal law in Pennsylvania nor compel him to admit any violation of state law which he had committed prior to the effective date of the Wagering Tax Act.<sup>7</sup> The

<sup>7</sup> Treasury Reg. 132, Section 325.40 (Pet. for Cert., p. 38).

foregoing statement is supported by a reference to the Briefs for the United States filed in the *Kahriger* case, supra. Therefore, the Federal Government could require Kahriger to pay the \$50 tax and register. *But not this petitioner.*

A brief comment is deemed proper with respect to the closing sentence of the Opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 34) wherein it stated:

"Of course, Congress may tax what it also forbids."  
(R. 34)

citing *United States v. Statoff*, 260 U. S. 477, as authority. It is submitted that the United States Court of Appeals for the District of Columbia Circuit completely misconstrued that language which was taken out of context. In the *Statoff* case, at page 480, the Court relied on the case of *United States v. Yuginovich*, 256 U. S. 450, 464. But the United States Court of Appeals for the District of Columbia Circuit overlooked the fact that the tax that was being referred to was the basic production tax on liquor whether or not legally or illegally manufactured. In the *Yuginovich* case this Court made a point of the fact that liquor could be manufactured for non-beverage purposes (p. 480) and all that the National Prohibition Act<sup>8</sup> prohibited was manufacture, etc., of intoxicating liquor for beverage purposes. This Court never upheld the so-called double tax applicable only to illegal manufacture. *Lipke v. Lederer*, 259 U. S. 557, *United States v. One Ford Coupe*, 272 U. S. 321, 328, and *United States v. La Franca*, 282 U. S. 568, 572.

All that this Court held in the Prohibition Act cases, decided by it and referred to hereinbefore, was that the basic production tax was a true tax in that it applied to the manufacture of liquor which was licensed as well as so-called bootleg whiskey. The Court also held that where an

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<sup>8</sup> Pet. for Cert., p. 44.

additional tax was imposed solely on illegal manufacture, that is, bootleg whiskey, the additional tax was not a true tax but was a penalty in the guise of a tax and was not a legitimate exercise of the taxing power. An identical situation exists in the present case inasmuch as the Federal Government has to the fullest extent of its authority wholly prohibited the wagering activity sought to be taxed.

## II.

### **THE PROVISIONS OF THE WAGERING TAX ACT CONTRAVERE THE PROVISIONS OF THE FOURTH AMENDMENT TO THE CONSTITUTION.**

The provisions of the Wagering Tax Act contravene the Fourth Amendment.<sup>9</sup> Specifically, it is submitted that Sections 3275 (Pet. for Cert., p. 47) and 3293 (Pet. for Cert., p. 30) of Title 26, U. S. C. contravene the provisions of the Fourth Amendment. It is well settled that probable cause for issuing a search warrant is less than proof of guilt.<sup>10</sup> As was stated in the case of *Dumbra v. United States*, 268 U. S. 435, at page 441:

“In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant.”

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<sup>9</sup> Fourth Amendment to United States Constitution (Pet. for Cert., p. 33).

<sup>10</sup> *Dumbra v. United States*, 268 U. S. 435; *Steele v. United States*, No. 1, 267 U. S. 498; cf. *Brinegar v. United States*, 338 U. S. 160; *Carroll v. United States*, 267 U. S. 132.

Compliance with the provisions of Chapter 27A, *supra*, would result in a posting by the Collector of Internal Revenue pursuant to the provisions of Section 3275, Title 26, U. S. C. (Pet. for Cert., p. 47). This section would require the Collector to post in a conspicuous place in his office, for public inspection, the name of this defendant and the time, place and business for which the special tax was paid. This would immediately put the United States Attorney for the District of Columbia on notice that this defendant was engaged in activities in violation of Federal law in this District, and he could immediately obtain the returns filed and use them in a prosecution against this defendant or at least obtain leads from them whereby he could prosecute him.<sup>11</sup> Further, Section 3293, *supra*, would require this defendant to post the special tax stamp in his place of business under penalty of Federal law if he fails so to do.<sup>12</sup> The contravention of the Fourth Amendment is made quite apparent by this section for the very business for which the special tax stamp is issued and required to be posted is unlawful in the District of Columbia.<sup>13</sup> Since compliance with either or both of the foregoing sections would lay a predicate for the issuance of a search warrant, this compulsion constitutes a device to obtain information under the guise of statutory authority so that thereafter the United States could assert "probable cause" for the issuance of a search warrant and subsequently contend that any search or seizure pursuant thereto was valid.

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<sup>11</sup> Treas. Dec. 4929, Secs. 463C.32, 463C.33, 463C.34, Pgs. 41-42; Treasury Dec. 5138, Sec. 458.611 (Pet. for Cert., Pg. 41 et seq.).

<sup>12</sup> Tit. 26, U. S. C., See. 3293 (Pet. for Cert., Pg. 30). Treasury Regs. 132, Section 325.53 (Pet. for Cert., Pg. 41)

<sup>13</sup> United States v. Yuginovich, *supra*, page 464.

## III.

**UNITED STATES v. KAHRIGER IS NEITHER CONTROLLING NOR PERSUASIVE.**

The United States relies wholly on the opinion of this Court in *United States v. Kahriger*, supra. However, the United States fails to realize that in the *Kahriger* case ‘his Court merely passed on the validity of the Wagering Tax Act as applied to activities *in the states*. This Court stated in the *Kahriger* case, supra, at page 26:

“ . . . The wagering tax with which we are here concerned applies to all persons engaged in the business of receiving wagers regardless of whether such activity violates state law. . . . ”

The question before this Court as stated by the United States in its Brief in *Kahriger*, at page 2 was:

“ Whether the occupational tax provisions of the Revenue Act of 1951 (26 U. S. C., Supp. V, 3290) which levy a tax on persons engaged in the business of accepting wagers, and require such persons to register with the Collector of Internal Revenue, are unconstitutional because incidental regulatory features of the registration section (26 U. S. C., Supp. V, 3291) infringe the police power reserved to the States.”

The question of the constitutionality of the Wagering Tax Act as applied in a federal jurisdiction which wholly prohibits wagering activities was never raised. In fact the United States in its Reply Brief filed in *Kahriger* stated at page 2:

“ . . . the occupation taxed is unlawful only under state laws . . . ” (Italics supplied)

and at page 3

“ . . . Wagering is doubtless unlawful in many states (perhaps in all but Nevada) but it is not forbidden by any Federal law. Thus the registration statement in which the taxpayer is required to set

forth his name, address and places of business, and the names and addresses of his agents or principals does *not call for a disclosure of information which will reveal a violation of federal law.*" (Italics supplied)

The contrary is the fact in the District of Columbia.<sup>14</sup>

It will be recollect that Kahriger was a defendant who had engaged in the business of accepting wagers in the State of Pennsylvania and failed to pay the \$50 tax required by Section 3290, *supra*. In that case this Court, properly, and before passing on the validity of the \$50 tax section, reviewed its prior decisions with respect to other taxing statutes and cited those decisions<sup>15</sup> as authority for its conclusion that the 10% tax imposed by Subchapter A of the Wagering Tax Act (Section 3285, et seq. Title 26, U. S. C., Pet. for Cert., p. 27) was constitutional.

There is a basic and controlling distinction between the instant case and the cases relied on by this Court in *Kahriger*. *In each and every case so cited, the statutes construed therein by this Court imposed taxes on activities which were not illegal under any Federal law.* Even today, persons engaged in such activities are not subject to Federal prosecution if the required tax is paid and compliance be had with the regulations effectuating such statutes. But this is not true as to the wagering tax. Payment does not confer a license to accept wagers. (Cf. *Irvine v. People*, 347 U. S. 128, 130.) The wagering activities embraced by the provisions of the Wagering Tax Act are prohibited by Federal laws to the fullest extent that the United

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<sup>14</sup> See footnote 2, *supra*.

<sup>15</sup> License Tax Cases, 5 Wall. 462 (Tax on lottery tickets—no federal law prohibiting lotteries at that time); *Veazie Bank v. Fenno*, 8 Wall. 533 (Tax on paper money issued by state banks); *McCray v. United States*, 195 U. S. 27, 59, 24 S. Ct. 769, 777 (tax on colored oleomargarine); *United States v. Doremus*, 249 U. S. 86, 39 S. Ct. 214 and *Nigro v. United States*, 276 U. S. 332, 48 S. Ct. 388 (tax on narcotics); *Sonzinsky v. United States*, 300 U. S. 506, 57 S. Ct. 554 (tax on firearms); *United States v. Sanchez*, 340 U. S. 42 (tax on marihuana).

States can proscribe such activities.<sup>16</sup> Payment of the tax confers no dispensation from liability for the Federal crime. Absent a constitutional amendment such as the 18th Amendment, the Federal Government has no authority either to permit or prohibit wagering activities in the states. The Constitution, however, confers on Congress sovereign power over the District of Columbia<sup>17</sup> and this power has been exercised to prohibit all wagering activities.

To state the proposition in another manner; payment of the taxes and registration and filing of returns pursuant to the statutes reviewed in the cases relied on by this Court in *Kahriger* give to the taxpayers permission or license to engage in those activities insofar as the Federal Government is concerned. In obeying those laws no revelation of a Federal crime is required. As was pointed out in the License Tax Cases, *supra*, quoted with approval by this Court in *Kahriger* at page 27,

". . . The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax and of implying nothing except that the licensee shall be *subject to no penalty under national law if he pays it.*" (Italics supplied)

Compliance with the provisions of the Wagering Tax Act would not exempt this petitioner from any penalties provided by the Federal laws prohibiting wagering in the District of Columbia. Section 3297, Title 26, U. S. C. (Wagering Tax Act, Pet. for Cert., p. 31) specifically negates any such conclusion because that section states in part:

"Sec. 3297. Applicability of Federal and State Laws.

"The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States . . ."

<sup>16</sup> See Footnote 1.

<sup>17</sup> Article I, Section 8, Clause 17 (Pet. for Cert., Pg. 44).

It is obvious that compliance with the provisions of the Wagering Tax Act would assure prosecution for the violation of other Federal laws by virtue of the notice which would be given to the United States Attorney by the posting provisions, Sections 3275 (Pet. for Cert., p. 47) and 3293 (Pet. for Cert., p. 30) and Treasury Decisions which make these excise returns available to the prosecuting authorities.<sup>18</sup> This petitioner was not required to comply with the provisions of the Wagering Tax Act by filing the returns required for if he had done so he would have waived his privilege against self-incrimination. In order to avail one's self of the privilege against self-incrimination a person must invoke the privilege at the first apprehension of danger, that is at the first moment when information is called for which if given by him would incriminate or tend to incriminate him of a violation of Federal law. In the case of *United States v. St. Pierre*,<sup>19</sup> the court said:

“The time for a witness to protect himself is when the decision is first presented to him;” . . .

The time when the decision is first presented to him differs according to the circumstances. As the court stated in *United States v. Pechart*:<sup>20</sup>

“ . . . It is conceded in the record that the defendants were men engaged in gambling and other related so-called racketeering activities. Because of that fact,

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<sup>18</sup> T. D. 4929 Pg. 26 Int. Rev. Cumulative Bulletin:

See. 463C.32 (Pet. for Cert., p. 41).  
See. 463C.33 (Pet. for Cert., p. 42).  
See. 463C.34 (Pet. for Cert., p. 42).

T. D. 5138 Int. Rev. Cumulative Bulletin, 1942-17-11074, Pg. 99:  
See. 458, 611 (Pet. for Cert., p. 43).

<sup>19</sup> *United States v. St. Pierre*, 132 F. 2d 837, writ dismissed, 63 S. Ct. 910, 319 U. S. 41.

<sup>20</sup> *United States v. Pechart*, 103 F. 2d 417, 419 (D. C. N. D. Calif. 1951).

are they to be deprived of the right to exercise their constitutional privileges?

"Preliminarily to a decision on the fact, I think it may be pertinent and appropriate to state that if the constitutional privilege becomes unavailing to a person because of his occupation, it is but a short step to make it unavailing to a man because he is a Republican or a Democrat, or a Catholic or a Jew. The privilege is one that is exercisable by any person provided that the facts and circumstances warrant its exercise." \* \* \*

"Furthermore, the case is not precedentially of any value to us *because the matter of the exercise of privilege may be different in given circumstances, at a different time, and in a different forum and where different issues are present.* Every case where the exercise of the privilege against self-incrimination is sought to be availed of must be determined with respect to the facts and circumstances of that particular case." (Italics supplied)

Where the questions call for answers incriminatory on their face there is no burden on the witness to show special circumstances why the answers called for would be incriminatory.<sup>21</sup> Where they are not incriminatory on their face, the person must show some tangible and substantial probability that his answers to such questions would tend to incriminate him. It is then for the court to finally determine whether incrimination is reasonably possible from any answer the witness may give, but, if such possibility exists the privilege bars compulsory disclosure of any fact that would tend to incriminate him.<sup>22</sup>

It is submitted that this petitioner properly exercised his privilege against self-incrimination. In the circumstances, the only thing he could do was to remain silent, refuse to pay the tax imposed by Section 3290 and withhold the information required by Section 3291 and Form 730

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<sup>21</sup> United States v. Raley, 96 F. S. 495, 496 (D. C. D. C. 1951).

<sup>22</sup> Estes v. Potter, 183 F. 2d 865, 868, Cert. Denied 81 S. Ct. 356, 340 U. S. 920.

(Pet. for Cert., pp. 45-46) because the questions call for answers which on their face incriminate or tend to incriminate in the District of Columbia.

In *Blau v. United States*, 340 U. S. 159, at page 160, 71 S. Ct. 223, 224, this Court stated:

"Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act. Prior decisions of this Court have clearly established that under such circumstances, *the Constitution gives witness the privilege of remaining silent.*" (Italics supplied)

All that is required in invoking the privilege against self-incrimination is that the answer might tend to incriminate or might furnish a link in the chain of evidence which might ultimately incriminate.<sup>23</sup> If a witness having the right to invoke the privilege under such circumstances fails to so do and furnishes the information called for, such person waives the privilege.<sup>24</sup>

### **CONCLUSION**

(1) Since the acceptance of wagers in the District of Columbia is wholly prohibited by Federal law, the 10% tax sought to be imposed on each wager accepted by persons engaged in the wagering business is unconstitutional.

(a) This 10% tax is retrospective and applies only to past activities and therefore contravenes the Fifth Amendment

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<sup>23</sup> *United States v. Burr*, 25 Fed. Cases, pages 38, 40, No. 14,692e. *Hoffman v. United States*, 71 S. Ct. 814, 818. *Blau v. United States*, 340 U. S. 159.

<sup>24</sup> *Rogers v. United States*, 71 S. Ct. 438. *United States ex Rel. Vajtauer v. Commissioner*, 47 S. Ct. 302, 273 U. S. 103. *United States v. Murdock*, 281 U. S. 141. *United States v. Monia*, 317 U. S. 424.

in that compliance with the pertinent provisions compel an admission of the commission of prior Federal crimes during the month in question.

(b) The 10% tax is a penalty in the guise of a tax and not a true tax in that proof of a commission of a Federal crime in the District of Columbia, to wit, the acceptance of a wager is a prerequisite to liability for the 10% tax. Therefore it is not a legitimate exercise of the taxing power.

(c) Since Section 3290, supra, the \$50 tax section, only requires those persons liable for the 10% tax to pay the \$50 tax and register, this petitioner did not violate the \$50 tax section by failing to pay as he was not liable for the 10% tax.

(2) (a) The \$50 tax section, Section 3290, supra, is of itself unconstitutional in that it contravenes the Fifth Amendment and also imposes penalties in the guise of a tax as it is grounded on a liability for the 10% tax. As has been shown, to be liable for the 10% tax, at least one wager must be accepted. Therefore, the \$50 tax and registration contemporaneous therewith would compel the admission of the Commission of at least one past Federal crime, to wit, the acceptance of a wager in the District of Columbia.

(b) Even if the \$50 tax section, Section 3290, supra, is construed by this Court to require payment of the \$50 tax and registration contemporaneous therewith prior to the acceptance of a wager, that Section is still only applicable to persons who subsequently will be liable for the 10% tax. In the District of Columbia this petitioner will never be liable for the 10% tax. Therefore, he was not liable for the \$50 tax.

(3) Sections 3275 and 3293 contravene the Fourth Amendment in that they are devices to furnish the prosecuting officials with information to assert as a

predicate for support of the requirement of "probable cause" required for the issuance of a valid search warrant.

(4) The decision of the United States Court of Appeals for the District of Columbia Circuit in this case if not reversed bestows in advance a judicial blessing on all amendments by the Congress of the United States to existing Federal criminal statutes providing for the imposition of excise taxes on illegal activities as well as requiring each violator of such statutes to file monthly returns confessing he has committed Federal crimes. The result would be the deletion of the Fifth Amendment from the Constitution of the United States.

WHEREFORE, this petitioner prays this Court that the Judgment of the United States Court of Appeals for the District of Columbia Circuit be reversed.

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